

## **ADVISORY NOTE 15: Best Practice: Detention of suspected shoplifters: Terms to be included in SLAs with security companies.**

### **Introduction**

South Africa is one of the top five countries that are hardest hit by shrinkage according to the Global Retail Theft Barometer: Shoplifting takes an enormous toll on the global retail industry, costing retailers billions in preventative measures and stock losses. The Barometer estimated that shrinkage cost retailers \$119 billion worldwide in 2011. Of that number, about 43% is accounted for by shoplifting, costing the industry \$51,5 billion.

Shoplifting hurts the economy, costing consumers higher prices at the cash register, and causing a loss of jobs when retailers are forced to close stores or even go out of business.<sup>1</sup>

Unfortunately, the response to this scourge by the security companies engaged by retailers is sometimes so heavy handed<sup>2</sup> that it lands the retailers in trouble with the law or causes them tremendous reputational damage.<sup>3</sup> Mistakes can be costly. A Namibian woman who was left traumatized and publicly humiliated when she was falsely accused of shoplifting was awarded N\$50 000 in damages against the owners of the Clicks store chain.<sup>4</sup>

In order to protect themselves, retailers should ensure that the Service Level Agreements (SLAs) that they have in place with third party security companies specify what is expected in the area of dealing with suspected shoplifters and provide for the consequences of non-compliance.

### **The Legal Environment**

South African law must now conform to the Constitution. Several constitutional rights could notionally come into play in respect of the detention of suspected shoplifters:

- The right to be presumed innocent, to remain silent;
- Equality- the right not to be unfairly discriminated against on the basis of race, gender, colour, age etc.
- Dignity- the right to have one's dignity respected.

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<sup>1</sup> See: <http://www.cgccrime.org.za/archive%5Ctrendsanalysis%5CThe%20Effect%20of%20Shoplifting.pdf> at 4.

<sup>2</sup> See security guards beating up a suspected shoplifter: [www.youtube.com/watch?v=Ja81wg\\_chdo](http://www.youtube.com/watch?v=Ja81wg_chdo).

<sup>3</sup> See: <http://www.dispatchlive.co.za/opinion/nightmare-for-customer-accused-of-shoplifting/>

<sup>4</sup> See:

[http://www.namibian.com.na/indexx.php?archive\\_id=83829&page\\_type=archive\\_story\\_detail&page=291](http://www.namibian.com.na/indexx.php?archive_id=83829&page_type=archive_story_detail&page=291).

- Freedom and security of person- the right not to be treated in a degrading way.
- Privacy- the right not to have one's person, home or property searched.
- The right not to be deprived of property.
- The rights of arrested, detained and accused persons (reproduced in full as Annexure "A").

These rights are not absolute – they may be limited in a manner that is reasonable and justified (section 36 of the Constitution).

In deciding whether the limitation of a right is reasonable and justifiable in an open and democratic society, one must take into account all relevant factors, including-

- (a) the nature of the right
- (b) the importance of the purpose of the limitation

The dictum of the *Supreme Court of Appeal in National Director of Public Prosecutions v Van Staden and Others* 2007 (1) SACR 338 (SCA) that implies that "incursions upon conventional liberties" are justified by the particular difficulties encountered in the detection and successful prosecution of certain types of crime was referred to by the Constitutional Court in *Mohunram and Another v National Director of Public Prosecutions and Another* (CCT19/06) [2007] ZACC 4 at para 71.

- (c) the nature and extent of the limitation
- (d) the relation between the limitation and its purpose
- (e) less restrictive means to achieve the purpose

In the case of *Minister of Safety and Security v Antus van Niekerk* CCT 74/06, the Constitutional Court declined to establish a general rule that a warning should be issued by a police officer instead of making an arrest. In coming to this conclusion, the Court took into consideration that there were guidelines in the Criminal Procedure Act and its Standing Orders, making it clear that arrest is a drastic procedure that should not be used if there are other effective means of ensuring that an alleged offender could be brought to court.

Security guards do not possess any special legal powers- they are considered to be the same as ordinary members of the public. They can either persuade persons they suspect of shoplifting to cooperate with their enquiries voluntarily or make an arrest in terms of section 42(1) of the Criminal Procedure Act 51 of 1977 if the suspect attempted to commit or commits in their presence or if they reasonably suspect the person of having committed an offence referred to in Schedule 1.

This includes theft, whether under the common law or a statutory provision. Theft is defined by C.R. Snyman, Criminal Law, 4th Ed. at p.469 as an unlawful and intentional appropriation of a movable corporeal property. J.R.L. Milton, South African Criminal Law and Procedure, Vol.2, 3rd Ed. states the following at p.617:

"In South African law it is not sufficient that the accused intentionally effected a contrectatio of the property. In order for there to be the mens rea of theft the contrectatio must be accompanied by an intention permanently to deprive the owner of the benefits of his ownership."

In *S v Lujaba* 1987(1)SA(A) the Appellate Division held that a person may be guilty of theft before he or she reaches the cashier, provided the circumstances are of such a nature that the inference may be drawn beyond a reasonable doubt that the person did not have the intention to pay for the article.

In that case, Botha JA observed at para 22:

"As 'n klant 'n artikel in die winkel neem en dit onder haar baadjie vasdruk, of byvoorbeeld selfs in haar sak steek, en sy word voorgekeer voordat sy by die betaalpunt kom, is 'n afleiding dat sy nie beoog het om daar voor te betaal nie en dus skuldig is aan diefstal, sekerlik nie sonder meer geregverdig nie. Of so 'n afleiding bo redelike twyfel geregverdig is, hang vanselfsprekend af van al die omstandighede van 'n bepaalde geval."

[My loose translation]:

" If a customer takes an article in the shop and shoves it under her jacket, or for example, even puts it in her pocket , and she is stopped before she gets to the pay point, this would not justify the conclusion, certainly in the absence of anything further, that she does not intend to pay for the article and therefore is guilty of theft. Whether such a conclusion is justified beyond a reasonable doubt, obviously depends on all the circumstances of a particular case. "

The security guard may also seize any article that is suspected to have been stolen and which is in the possession of the person arrested (section 23(i)(a)). The article seized is considered to be evidence and must be handed over to a police official as soon as possible.

The Consumer Protection Act 68 of 2008 created a number of requirements that have an impact on how suspected shoplifters are to be treated:

- They can't be unfairly discriminated against or treated differently on the grounds of their race, religion, gender etc. as set out in section 9 of the Constitution;(section 8);
- A supplier or an agent of the supplier must not use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics (section 40) (considered below);

- They are entitled to be protected from unfair, unreasonable, unjust or otherwise improper trade practices (section 3(1)(d)).

Section 113 makes the employer of an employee or principal of an agent jointly and severally liable with that person if that person is liable in terms of the Act for anything done or omitted in the course of that person's employment or activities behalf of the employer or principal. This means retailers cannot merely pass the blame on to the security companies.

As far as the use of force in making an arrest is concerned, Section 49 (2) of the Criminal Procedure Act permits the use of force that is reasonably necessary and proportional in the circumstances to overcome resistance or to prevent the suspect from fleeing. This is only applicable if it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force.

The Courts have given some guidance as to the manner in which a suspected shoplifter is to be treated. Starting with what not to do, in the Namibian High Court case involving Clicks referred to previously, Judge Dave Smuts said that the treatment that the suspected shoplifter received when she was accused of shoplifting was "utterly appalling".<sup>5</sup>

Briefly, the facts were that after the shopper had paid for the cosmetics she had bought at the shop, a security guard stopped her at the door of the store. He accused her of having stolen a deodorant that was in her handbag. She had bought the deodorant at another shop the previous day.

The guard refused to listen to this explanation or allow her to fetch the receipt from her car. In spite of the fact that the receipt was subsequently fetched from the car by an acquaintance of the shopper and shown to the management of the store, the shopper was handcuffed and, in full view of other customers in the crowded shop, forcibly taken to a back office, where she was handcuffed to a chair. She was held there for about two hours and was later escorted out of the shop by the Police, again in full view of the public.

The South Gauteng High Court, Johannesburg, case of *Susman v Mr Price Ltd* (2008/4046) [2011] ZAGPJHC 90 also involved an article that the shopper had purchased elsewhere. In that case, the shopper sued the store for damages for her unlawful detention and defamation when she was prevented from leaving the store until she could prove that she had bought the shoes she was wearing from another branch of the same store. Her husband eventually brought the receipt.

The court decided that the store had acted lawfully and that by acting as it did, customers were given an opportunity to prove their innocence and to pay for the item in their possession, if it has not already been paid for, whilst they are still inside the store or they could produce the proof of purchase at the door.

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<sup>5</sup> See:

[http://www.namibian.com.na/index.php?archive\\_id=83829&page\\_type=archive\\_story\\_detail&page=2890](http://www.namibian.com.na/index.php?archive_id=83829&page_type=archive_story_detail&page=2890)

## **Survey of practices**

Extracts from various practice notes on how to deal with shoplifters from around the world are collected in Annexure "B". From these the practices listed below have been extracted. It is recommended that Retailers incorporate terms dealing with these practices in their Service Level Agreements with security service providers. The following is given as an illustration:

### **Protocol for dealing with suspected shoplifters**

The security service provider shall ensure that its employees or agents are familiar with and apply this protocol as is appropriate to the circumstances while performing security services at the retailer's premises.

- 1) Prior to taking any action, the security employee or agent shall ensure that he or she:
  - a. actually witnessed the shopper shoplifting/ concealing one or more items and that he or she maintained continuous observation of the shopper until confronting them or
  - b. has a reasonable belief that the shopper has shoplifted/ concealed one or more items or has an item in his or her possession that was taken from the premises but not paid for.
  
- 2) If the security employee or agent:
  - a. actually witnessed the shopper shoplifting/ concealing one or more items or and that he or she maintained continuous observation of the shopper until confronting them or
  - b. has a reasonable belief that the shopper has shoplifted/ concealed one or more items or has an item in his or her possession that was taken from the premises but not paid for

whether or not the shopper has passed the payment point with the item/s, the security employee or agent should discretely and politely approach the shopper and ask to be shown proof that the item/s was/ were paid for.
  
- 3) If the shopper is able to provide satisfactory proof of payment, the security employee or agent should thank them and permit them to leave the premises.
  
- 4) If the shopper is not able to provide satisfactory proof of payment or provides some other explanation for being in possession of goods that have not been paid for, or concealing goods if they have not yet passed the payment point , the security employee or agent should ask the shopper to accompany him or her to the manager's office to clarify the matter.

- 5) The security employee or agent shall treat the shopper with dignity and respect and shall not accuse the shopper of theft or treat them as if they are guilty of theft.
- 6) If the shopper refuses to cooperate, the security employee or agent should warn them that if they do not do so, he or she will make a citizen's arrest.
- 7) If the shopper continues to refuse to cooperate and the security employee or agent is certain that he or she witnessed the shopper shoplift or conceal an item/s or has reasonable grounds for believing that the shopper shoplift or conceal an item, he or she shall verbally place the shopper under arrest and inform the arrested person of the cause of the arrest i.e. that the arrested person is suspected of having attempted to leave the shop without paying for the goods.
- 8) The security employee or agent should not touch, hold, or handcuff the arrested person or use force to restrain or prevent the arrested person from escaping unless is necessary to do so and even then only use such force as is reasonably necessary to restrain the arrested person. The police should immediately be called and the arrested person handed over to them for further investigation and action.
- 9) If the shopper cooperates and there is no need to affect an arrest, the security employee or agent should accompany them to the manager's office, taking care to ensure that the shopper does not dispose of the suspected stolen goods on the way to the manager's office.
- 10) Once in the manager's office, the shopper should be requested to hand over any goods that the security employee or agent has reasonable grounds for believing they have shoplifted or concealed, if applicable.
- 11) If the shopper refuses to cooperate, the shopper should be placed under arrest. The police should be called and the arrested person handed over to them for further investigation and action, unless the store manager instructs that the arrested person first be searched.
- 12) If the security employee or agent does search the arrested person, the search shall be conducted in accordance with the arrested person's fundamental Constitutional rights, especially dignity and privacy. The arrested person must be searched by a person of the same gender as them.
- 13) As soon as a shopper is placed under arrest, they must be informed promptly:
  - a. of the right to remain silent; and

b. of the consequences of not remaining silent;

and not to be compelled to make any confession or admission that could be used in evidence against them.

- 14) If any suspected stolen goods are recovered from the shopper/ arrested person, they should be safeguarded and preserved as evidence in accordance with the instructions of the police.
- 15) Where possible, a shopper should be given the opportunity to provide proof of purchase or other explanation before a decision is made to arrest them and hand them over to the police.
- 16) It should be borne in mind that there needs to be proof beyond reasonable doubt that the shopper intended to avoid paying for an item.
- 17) Special care should be taken when dealing with the elderly, juveniles and persons possibly suffering from a mental incapacity or health problem such as diabetes.

### **Conclusion**

While the law certainly recognises the rights of retailers to protect themselves from shoplifting, it does expect them at the same time to respect the Constitutional Rights of consumers. These include the right to be treated with dignity and to be presumed innocent until proven guilty. Retailers can reduce the likelihood of running into trouble by contractually imposing upon third party security companies, through their respective SLAs, terms of the sort set out above. The SLAs should also provide for the consequences of non-compliance.

**35. Arrested, detained and accused persons**

Everyone who is arrested for allegedly committing an offence has the right -

- a. to remain silent;
- b. to be informed promptly -
  - i. of the right to remain silent; and
  - ii. of the consequences of not remaining silent;
- c. not to be compelled to make any confession or admission that could be used in evidence against that person;
- d. to be brought before a court as soon as reasonably possible, but not later than -
  - i. 48 hours after the arrest; or
  - ii. the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
- e. at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
- f. to be released from detention if the interests of justice permit, subject to reasonable conditions.

**Extracts from various practice manuals**

<http://www.securitysa.com/article.aspx?pkarticleid=5907>

Once the suspect is arrested, he/she may be searched. The search has to be conducted in accordance with the suspect's fundamental rights as depicted in The Constitution (Act 108 of 1996), especially where dignity and privacy are concerned, eg:

\* A female suspect may only be searched by another female and

\* A male suspect may only be searched by another male.

Although the law prescribes that the arrested suspect has to be handed over to the police as soon as possible. This implies that the police can be called out to the store premises to collect the suspect. If the manager is confident that his/her safety is not in danger, he/she may transport the suspect to the nearest police station (Act 51 of 1977 article 42 read with article 50).

**The role of the police**

Once the police have taken custody of the suspect (which implies he is being kept in a holding cell), it is their responsibility to conduct an investigation in order to gather all the necessary evidence to prove a criminal case. Therefore any items that have been seized from the suspect are considered evidence and have to be handed over to the police. Photos should preferably be taken of perishable items, which would, instead of the rotten items, be presented to court as evidence. Such items will not necessarily have to be present in court but could, with the permission of the police, be destroyed. Other valuable items might, on the discretion of the police, be safeguarded by management as evidence and kept until needed in court.

[https://www.police.nsw.gov.au/\\_data/assets/.../booklet\\_shoplifting.doc](https://www.police.nsw.gov.au/_data/assets/.../booklet_shoplifting.doc)

**A 'Citizens Arrest'.**

The Crimes Act says that you (or any person) may 'arrest' someone who is caught committing, or who has just committed an offence which is punishable under the law.

The law also says that if a number of people act together intending to achieve an illegal result, then every act done by one of them is done by all of them.

You may stop and detain a person who has committed an offence such as stealing:

- At the time they commit the offence, or
- Immediately after they commit an offence

You cannot arrest the person a few hours later or the next day.

If the situation causes danger to you, your staff or customers, do not try to detain the offender. The value of the goods can never exceed the value of your life.

You have a duty of care to all people you detain for an offence. You also have a duty of care if you decide to release a person from your store before police become involved. Juveniles should only be released into the care of a parent, guardian or police.

If you decide to detain a shoplifter:

- Explain who you are (eg. The manager, store security officer, etc) and show identification.
- Tell the person why they are being detained.
- Use only reasonable force to detain the person (force that any reasonable person would use if faced with the same situation)
- Advise the person that the police will be called.
- Ask the person to surrender any property which does not rightfully belong to them

[www.pathwayskelowna.ca/wp-content/.../03/Shoplifting-Procedure.doc](http://www.pathwayskelowna.ca/wp-content/.../03/Shoplifting-Procedure.doc)

2. Make the approach from the front. DO NOT use force. DO NOT lay hands on the person. DO NOT speak in a loud enough voice that it would bring attention from others. The approach conversation should be firm, to the point, and polite. It's possible that there has been a mistake and/or a misunderstanding that can be explained. State, "I am with Pathways and I've been observing you. Perhaps I'm mistaken, but do you have something in your purse/wallet/coat that you haven't paid for? Would you please accompany me back into the store so we can clear this matter up?"

3. On the slight chance that the suspect makes a run for it, many times grabbing loose clothing or a belt loop will stop the person. If they resist and or act in an aggressive manner let the person go. Do not chase him/her through the store, outside and/or with a car.

4. Accompany the person back into the store and if this has not already been done, call the police. Use no force to guide the person back inside.
5. Ask for the return of the merchandise in question. Ask for identification. Determine if there are extenuating circumstances that would keep us from prosecuting i.e. age of suspect, no merchandise found, mental capacity of suspect.
6. While waiting for the police, begin creating a written record of pertinent facts, observations and verbal exchanges or statements. Requests for water, to take prescription medications or to use the restrooms, should be honored. Any emergency situations should be handled by calling "911." Requests you can and should decline include smoking, calling attorney, calling parents and "getting some fresh air."
7. Once the police arrive they are in charge. Cooperate fully. Complete a Critical Incident Report form. All physical evidence should be photographed and either turned over to the police, or segregated and kept in a secure location for future civil or criminal proceedings.

Use the Golden Rule as a guiding principle when dealing with a suspected shoplifting incident. "Do unto others as you would have them do unto you."

[http://retail.about.com/od/lossprevention/qt/policy\\_shoplift.htm](http://retail.about.com/od/lossprevention/qt/policy_shoplift.htm)

When approaching a suspicious person, try to remain calm and professional. It is possible that a misunderstanding has taken place and the person is not actually a shoplifter. Treating the suspect in a polite, discrete yet firm and professional manner will help you and your store avoid a slander, false arrest, or discrimination lawsuit.

<http://www.crimedoctor.com/shoplifting2.htm> (It is recommended that retailers access this very informative site)

Before detaining anyone, you must establish Shoplifting Probable Cause. To establish a solid base for probable cause and prevent false arrest claims, there are six universally accepted steps that a merchant should follow before deciding to stop someone suspected of shoplifting:

1. You must see the shoplifter approach your merchandise
2. You must see the shoplifter select your merchandise
3. You must see the shoplifter conceal or carry away or convert your merchandise
4. You must maintain continuous observation the shoplifter
5. You must see the shoplifter fail to pay for the merchandise
6. You must approach the shoplifter outside of the store

The detention process starts when the customer is initially confronted. If the suspected shoplifter has unpaid merchandise at the time of the detention, ask them to, "please return to the store so we can clear up this matter." If you act professional and with back-up, ninety-eight percent of the time the shoplifter will comply and go anywhere you direct, without fanfare.

The loss prevention agent should try to recover at least one item outside of the store to confirm that a theft occurred and the item was not dumped. Stopping a customer without stolen goods is called a bad stop or an unproductive detention. Unproductive stops can and should be terminated while still outside, along with a sincere apology for the confusion.

<http://www.nda.agric.za/docs/GenPub/BOOK%2016.pdf>

Ask him to follow you to the office and contact the police immediately. Do not confront the shoplifter in front of other customers. If he wants to know why he should follow you to the office, tell him discreetly that you want to ask him some questions...

Make sure the goods the shoplifter has tried to steal stay in the possession of the shoplifter and do not get displaced or are disposed of before the police arrive.

<http://www.legalcity.net/Index.cfm?fuseaction=RIGHTS.article&ArticleID=9306527>

## **Shoplifting**

### **Stealing from shops**

In supermarkets and other big stores, an absent-minded person occasionally walks away with goods without paying for them. This can lead to prosecution for theft.

A person suspected of shoplifting is usually approached by the store detective or some other member of staff and asked to go to the manager's office. Although at this stage the suspect is under no legal obligation to comply, refusal to do so may lead to arrest by the store detective. The detective has no special legal status and the arrest is that of an ordinary citizen. (See arrest.)

The detective does not have to wait until a suspect leaves a store before making an arrest. Waiting, however, may make it easier to prove that the shopper had no intention of paying. In fact, the detective can make an arrest either inside or outside a store. A suspect can even be followed into another store and arrested there. It is best not to resist arrest.

In the store manager's office, the shopper does not have to answer any questions and can ask to phone an attorney to ask for advice. If possible, the shopper should speak to an attorney out of earshot of the store staff, the reason being that any damaging statement they overhear could be repeated as evidence in court.

A shopper who has taken something from the store by mistake without paying for it, can possibly avoid prosecution by explaining how the mistake came about. The disadvantage of this approach is that whatever is said may be taken down and repeated in court.

If an attorney agrees to come to the manager's office, it is best not to say anything until he or she arrives.

If the store manager accepts the shopper's story or begins to doubt the detective's evidence, the store may simply drop the matter. Securing a conviction for shoplifting - a form of theft - requires the prosecution to prove beyond reasonable doubt that the shopper intended to avoid paying for an item.

If the store decides to prosecute, the shopper must be handed over to the police as soon as possible.

### **Wrongful arrest**

A shopper who is arrested by a store detective and acquitted may have grounds to sue for malicious arrest or malicious institution of criminal proceedings.

If the detective used force, even though the shopper did not resist, the shopper could sue for damages for assault. However, in order to succeed in the action, the shopper will have to prove that a charge was laid without reasonable cause.

Increased damages might be paid to a shopper who was detained in the manager's office for an unreasonable period or who suffered exceptional embarrassment or humiliation. If the detective or any other member of the staff accuses a customer of shoplifting in front of witnesses and it is later proved that the customer was not guilty of the offence, the shopper may be able to claim damages for defamation. If only the detective was present, the shopper may be able to sue for injuria. (See criminal injuria.)